Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ARKOMA PRODUCTION COMPANY, ARKLA, INC. and ARKLA EXPLORATION COMPANY,

Conditional Cross-Petitioners,

vs.

BOB KLEIN and GENEVIEVE KLEIN, JOHN FRANK PENDERGRASS, SAM THOMPSON, MARGARET SCHAFFER, CLYMER LAW, DONNIE HALL, *et al.*,

Respondents and Cross-Respondents.

Conditional Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

Whether the court of appeals erred in reversing expressed factual findings of district court of applicability of controlling state law statute of limitation without mentioning Federal Rules of Civil Procedure Rule 52(a), without explicit application of the clearly erroneous standard to the district court's findings and without explanation, if the court of appeals was of that view, as to why the district court's expressed findings on the time bar were clearly erroneous.

Whether the court of appeals' failure to apply the clearly erroneous standard so far departed from the accepted and usual course of judicial proceedings in usurping the district court's role as fact-finder that this Court should exercise its supervisory power to correct the Eighth Circuit's failure to apply the proper standard of appellate review.

PARTIES TO THE PROCEEDING

Respondents are a class of approximately 3,000 oil and gas royalty owners whose claims derive from oil and gas leases owned, in part, by Arkoma Production Company on properties located in Arkansas. Arkoma Production Company ("Arkoma") and its affiliated entities are the Conditional Cross-Petitioners. The original Petitioners are Jerral W. Jones and Michael V. McCoy. Arkoma is a wholly owned subsidiary of Arkla Exploration Company ("AEC"), a Delaware corporation. AEC is also a Delaware corporation and a wholly owned subsidiary of Arkla, Inc. Arkla, Inc. is a Delaware corporation now known as NorAm Energy Corp.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Conditional Cross-Petitioners, Arkoma, Arkla and AEC, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eighth Circuit from which review is sought are reported as *Klein*, 980 F.2d 521 (8th Cir. 1992) ("*Klein I*") set forth in the original Petitioners' appendix ("Pet. App.") at 83a, and *Klein v. Arkoma Production Company*, 73 F.3d 779 (8th Cir. 1996) ("*Klein II*"), set forth in the appendix ("Pet. App.") at 1a. The opinion of the United States District Court for the Western District of Arkansas is unreported and is set forth at Pet. App. 25a. The earlier bench rulings and opinions of the district court are unreported and are set forth at Pet. App. 107a and in the appendix of the Cross-Petitioners ("Arkoma App.") at 2a-8a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 9, 1996. Petitions for rehearing were denied on March 4, 1996. This Conditional Cross-Petition is filed pursuant to Supreme Court Rule 12.5. This case was placed on the docket of the Court on May 29, 1996, following the filing of the original Petition of the Petitioners on May 28, 1996.

CONSTITUTIONAL PROVISIONAND REGULATIONS INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Rule 52(a) of the Federal Rules of Civil Procedure:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of [sic] the credibility of the witnesses.

STATEMENT OFTHE CASE

Respondents, lessors-royalty holders, brought this diversity action alleging Arkoma, one of their lessees, had breached an implied covenant to reasonably market natural gas produced pursuant to the royalty holders' leases. Applying controlling Arkansas law, the District Court determined that the royalty holders' implied covenant to market cause of action was time barred and issued express findings that there was no fraudulent concealment or other action which would toll the running of the applicable time bar. The Eighth Circuit reversed the District Court's time bar dismissal expressly basing the reversal ". . . on the facts. . . ." Pet. App. 104a. The Eighth Circuit did not mention Federal Rules of Civil Procedure Rule 52(a), did not explicitly apply the clearly erroneous standard to the expressed District Court's findings and offered no explanation for any finding, if the Eighth Circuit was of that

view, as to why the District Court's express findings on the time bar were clearly erroneous. *See Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986). This extraordinary injustice warrants exercise of this Court's supervisory power.

FACTUAL BACKGROUND

At pages 3-9 of their Petition, Petitioners, Jones and McCoy ("JM"), describe the proceedings below with reference to the District Court's original grant of summary judgment, the Eighth Circuit's reversal as to one of the causes of action alleged by the royalty holders against JM (an unjust enrichment claim), the trial of that cause of action by the District Court on remand and the failure of the Eighth Circuit to review the District Court's findings of fact on second appeal. The procedure below was similar with reference to the Conditional Cross-Petitioners, Arkoma and affiliated entities. Except as is noted in the next sentence, all causes of action against Arkoma were dismissed originally on summary judgment and the dismissal was sustained in *Klein I*. *See Klein II*, Pet. App. 5a. The exception is the above mentioned cause of action contending Arkoma had breached its implied duty to reasonably market natural gas produced from the leased properties. The District Court initially determined that the cause of action was time barred. As the royalty holders requested the opportunity to establish that the time bar was tolled by fraudulent concealment or other actions of Arkoma, the marketing action was tried on the merits during the seven day trial in 1991. At the end of the seven day trial, the District Court expressed its doubt as to whether the royalty holders had been able to establish the merits of their cause of action; however, the Court did not reach the merits as the Court expressly determined that there was no fraudulent concealment or other basis for tolling the applicable statute of limitation and dismissed the cause of action as time barred. Arkoma App. 2a-8a.

In an extraordinarily unusual manner which should cause this Court to invoke its supervisory control, the Eighth Circuit reversed the time bar decision without express reference or other indication that its review was accomplished pursuant to the controlling, "clearly erroneous" standard of Rule 52(a).

On remand[1], the District Court[2] reviewed the record of the seven day trial in 1991 (as the liability issues [3] had been tried fully), issued detailed findings of fact indicating that Arkoma's marketing decisions were prudent and reasonable and dismissed the marketing action on the merits. In *Klein II*, the Eighth Circuit commented that such findings "may be correct" but astonishingly determined that the reasonableness and prudence[4] of the marketing action was not the issue and so defined Arkoma's implied duty to reasonably market gas as including a duty to ensure the royalty holders received a portion of the funds paid by Arkla to JM as consideration[5] for the determined take-or-pay settlement, *Klein II*, Pet. App. 12a-14a.

---

1. The Conditional Cross-Petitioners have preserved, and not waived, their position that the marketing claim is time barred. *See, e.g.*, Arkoma brief reference *Klein II*, p. 14, n.7, Arkoma App. 9a; Arkoma Petition for Rehearing in *Klein II*, pp. 2-3, Arkoma App. 11a-13a. The failure to apply the controlling three year limitation and properly judge the Trial Court's findings of fact by the clearly erroneous standard works a manifest injustice.

2. As the original District Court Judge, Morris Arnold, had been elevated to the Eighth Circuit, the trial on remand was conducted by Judge Jimm Larry Hendren.

3. Damage issues have never been tried on the basis of a bifurcation order entered in this matter at the request of the Plaintiff Class.

4. Stated to be the "test of compliance" with an implied covenant in *Klein I*, at Pet. App. 104a.

5. Even though the Eighth Circuit acknowledged that none of the monies determined by the Eighth Circuit to be subject to the royalty holders' share flowed through Arkoma but rather were paid directly by Arkla to JM. *Klein II*, at Pet. App. 10a-11a.

During the 1991 trial, the District Court presented to the royalty holders every opportunity to establish a basis for tolling the controlling state statute of limitation. Yet after the seven day trial, the District Court made express findings that there had been no fraudulent concealment or other basis for tolling the statute of limitation which barred the action. The action was dismissed.

During the seven day trial, the District Court stated (Arkoma App. 2a):

> The court indicated at the end of the plaintiffs' case that it believed that the Arkansas Supreme Court would hold that there could be fraudulent concealment within the meaning of that phrase as used in the context of the statute of limitations if Arkla, or any of the defendants, rather, AEC or AER, kept confidential certain contractual arrangements with its producers at least partly for the purpose of delaying notice to royalty owners of those contracts.
>
> The court finds that, to the extent gas purchase contracts were in fact kept confidential, that no part of the motive for keeping those contracts confidential was furnished by a desire to hide them from lessors of gas interests. I think the record, the testimony of Mr. Atkinson on the one hand and on Mr. Warren on the other established that fact to the satisfaction of the court.

At the conclusion of the seven day trial, the District Court expressly found (Arkoma App. 4a-5a):

> Though defendants had pleaded the statute of limitations as a defense to all of plaintiffs' causes of action and had moved for summary judgment on that basis, plaintiffs indicated to the court that they wished to put on proof to the effect that the statute of limitations had been tolled by the fraudulent concealment of defendants. At the end of all of the proof, after seven days of testimony, the court ruled that plaintiffs had failed to carry their burden of showing any fraudulent concealment of plaintiffs' cause of action and therefore ruled against them on that issue.

On appeal, at Pet. App. 104a-105a, after noting the time bar ruling of the District Court, the Eighth Circuit stated:

> However, based on the facts, we hold that the action is not time barred.
>
> * * *
>
> The novation agreement between Arkoma and Arkla was formally executed on February 13, 1987. This action was brought by the filing of a complaint on February 23, 1990, three years and ten days later. The trial court held the three year statue applicable, found that the statute started to run when the novation occurred, and dismissed the suit as time barred by ten days. Appellants claim that it was not until March, 1987, when they received their January royalty checks, that they were put on notice of the change in their share. Appellees admit that they attempted to

> complete the novation of the take-or-pay contract as secretly as possible.
>
> We recognize that the clear language of Section 16-56-105 encompasses the oil and gas leases of appellants, including the implied covenant which is an integral part of such lease. . . . In *Scroggin Farms Corp. v. Howell,* 216 Ark. 569, 266 S.W.2d 562 (1950), the Arkansas Supreme Court observed that, 'if the plaintiff, by reasonable diligence, might have detected the fraud he is presumed to have reasonable knowledge of it.'
>
> Appellants claim that the statute did not begin to run until they had or, by the exercise of due diligence, should have known, the facts that gave rise to their cause of action. We agree. The statute did not begin to run until late March, 1991, and the action is not time barred.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

Controlling Arkansas law is clear that neither ignorance of the existence of a cause of action nor lack of notice of the cause of action prevents the limitation from running from the time the cause of action accrues. *Chapman v. Alexander,* 307 Ark. 87, 88, 817 S.W. 2d 425 (1991); *Ford's Inc. v. Russell Brown & Co.,* 299 Ark. 426, 429, 773 S.W. 2d 90, 92 (1989); *Riggs v. Thomas,* 283 Ark. 148, 149, 671 S.W. 2d 756, 757 (1984). In both *Ford's Inc.* and *Riggs*, the Arkansas Supreme Court expressly declined to overturn this principle of Arkansas law in favor of a "notice" rule

regarding the commencement of a limitation period. In *Chapman*, the Arkansas Supreme Court expressly rejected three alternative "notice" approaches and declared that any change in the Arkansas rule would have to come from the Arkansas General Assembly. Even the Eighth Circuit Court of Appeals has applied the very Arkansas statute creating the limitation involved in this case and has noted the Arkansas Supreme Court's rejection of any type of notice rule. *Resolution Trust Corp. v. Armbruster*, 52 F.3d 748, 752 (8th Cir. 1995).

Because of this controlling Arkansas legal principle, the Eighth Circuit's decision overturning the District Court's time bar decision can only be understood in the context of some determination of fact by the Eighth Circuit. The opinion so indicates. Pet. App. at 104a (". . .based on the facts, we hold that the action is not time barred."). Yet, the Eighth Circuit expressed no effort of reviewing the District Court's explicit findings. The Eighth Circuit expressed no application of the "clearly erroneous" standard of Rule 52(a). And, if the Eighth Circuit was of the opinion that the District Court's findings were clearly erroneous, the court offered no explanation in support of its view.[6] *See Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809, 811 (1986).

The record of the 1991 trial supports the District Court's findings.[7] More importantly, review should be granted because

---

6. At Pet. App. 104a, the Eighth Circuit states "[a]ppellees admit that they attempted to complete the novation of the take-or-pay contract as secretly as possible." There is no such admission in the record of the 1991 trial. The statement is another example of *Klein I*'s recitation of "the plaintiffs' allegations . . . assumed . . . to be true" of which JM complains in their Petition.

7. Mr. Alan Warren, president of Arkoma, testified that neither Arkoma nor Arkla Exploration Company did anything to keep royalty owners from (Cont'd)

the court of appeals expressed no effort to comport to its role of reviewing findings of fact pursuant to the clearly erroneous standard. *Anderson v. City of Bessemer City*, 470 U.S. 564, 566 (1985); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 858 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 108 (1969). This Court's Rules state that it will consider granting the writ where a United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). That standard has been met here.

(Cont'd)
discovering the price change which was effective January 1, 1987. Arkoma App. 14a. Mr. Warren testified that there was no action or decision among the Arkoma employees to secrete or hide the fact that the pricing amendment was being executed. Arkoma App. 15a. Mr. Warren's testimony, together with other testimony, established the fact that, to the extent that information regarding the gas purchase contracts was kept confidential, no part of the motive for doing so was furnished by a desire to hide the contracts from the lessors. Arkoma App. 2a. The referred to testimony provides ample support for the Trial Court's finding of no fraudulent concealment.

CONCLUSION

Some cases, although not otherwise constitutionally provocative, develop with constitutionally defective procedure so that due process demands rectification. This is one such case. Conditional Cross-Petitioners respectfully request this Court to exercise its supervisory power and direct the Eighth Circuit to consider, pursuant to the "clearly erroneous" standard of Rule 52(a), the District Court's determination that the applicable statute of limitation bars the royalty holders' claim.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION FILED JANUARY 28, 1991

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FOR SMITH DIVISION

Civil No. 90-2060

BOB KLEIN et al.

Plaintiffs

vs.

ARKOMA PRODUCTION COMPANY et al.

Defendants.

ORDER

NOW on this twenty-eighth day of January, 1991, comes on for consideration the plaintiffs' Motion for Separate Trials of Issues of Liability and Damages, filed on January 10, 1991, in the above-styled cause. And the defendants filed responses on January 22, 1991.

IT APPEARING to the court that the motion should be granted in part, it is ORDERED that the motion be, and it is hereby, granted in part, in that the trial will be conducted in two phases, namely, liability and damages, but those phases will be sequential in the same trial setting. In other words, trial on the liability phase will proceed, to be followed immediately thereafter, if necessary by trial on the damages phase.

s/ Morris S. Arnold
Hon. Morris S. Arnold
United States District Judge

APPENDIX B — TRANSCRIPT OF PROCEEDINGS

[Commencing at page 2]

THE COURT: On the matter of the statute of limitations pleaded by the defendants in this case, the court has already indicated that it believes that the statute begins to run when a cause of action accrues, unless that statute's running is tolled by some act on the part of the defendants that can be described as fraudulent concealment.

The court indicated at the end of the plaintiffs' case that is believed that the Arkansas Supreme Court would hold that there could be fraudulent concealment within the meaning of that phrase as used in the context of the statute of limitations if Arkla, or any of the defendants, rather, ABC or AER, kept confidential certain contractual arrangements with its producers at least partly for the purpose of delaying notice to royalty owners of those contracts.

The court finds that, to the extent gas purchase contracts were in fact kept confidential, that no part of the motive for keeping those contracts confidential was furnished by a desire to hide them from lessors of gas interests. I think the record, the testimony of Mr. Atkinson on the one hand and of Mr. Warren on the other established that fact to the satisfaction of the court.

However, because of this eleventh-hour argument — which is an interesting argument, and I don't by an means mean by calling it an eleventh-hour argument to indicate that I think there's anything improper about it — that the plaintiffs have

* * *

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION FILED APRIL 11, 1991

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil No. 90-2060

BOB KLEIN AND GENEVIEVE KLEIN; JOHN FRANK PENDERGRASS; SAM THOMPSON; MARGARET SCHAFFER; CLYMER HALL AND DONNIE HALL

PLAINTIFFS

v.

ARKOMA PRODUCTION COMPANY; ARKLA, INC.; ARKLA EXPLORATION COMPANY; JERRAL W. JONES AND MICHAEL V. McCOY

DEFENDANTS

MEMORANDUM OPINION

This case is about gas royalties. The plaintiff land-owners leased their mineral interests at various times to Arkoma Production Company (Arkoma) in return for royalties on the revenues attributable to gas severed from their land and sold. Arkoma, in turn, entered into contracts with Arkla Energy Resources (AER), a pipeline company, under which AER agreed to take or pay for certain percentage of the deliverable gas owned

by Arkoma. By 1984, because cheaper sources of gas were available to AER, AER had refused to honor these take-or-pay obligations, and the dispute that developed between Arkoma and AER on December 21, 1986. Plaintiffs received no part of the consideration paid to Arkoma for this sale.

One of the objects of AER's purchase of Arkoma was to allow it to renegotiate the take-or-pay clauses in the relevant contracts and to gain its release from take-or-pay obligations already accrued. To that end, on February 13, 1987, Mr. Fred O. Roe, Jr., on behalf of Arkoma, wrote to AER accepting a previously proposed novation "on the condition and with the understanding that AER has agreed contemporaneously herewith to amend further each contract in a form acceptable to Arkoma" in certain specified ways. (*See* plaintiffs' Exhibit No. 156).

This lawsuit was filed on February 23, 1990. Though plaintiffs characterized their lawsuit in numerous ways in their complaint, the court, at the beginning of the trial, in an oral opinion delivered on the record, dismissed all of plaintiffs' causes of action except the one for breach of an implied covenant to market gas. The court was of the view that the novation worked by defendants with respect to Arkoma's gas purchase contracts might have amounted to a breach of Arkoma's covenant to market gas, an obligation that, the court feels, the Supreme Court of Arkansas would hold is implied in all oil and gas leases. *See, e.g., Hillard v. Stephens*, 276 Ark. 545, 637 S.W.2d 581 (1982). The court therefore invited plaintiffs to put on proof that might tend to establish such a breach and to demonstrate that the renegotiation worked to their financial detriment.

Though defendants had pleaded the statute of limitations as

a defense to all of plaintiffs' causes of action and had moved for summary judgment on that basis, plaintiffs indicated to the court that they wished to put on proof to the effect that the statute of limitations had been tolled by the fraudulent concealment of defendants. At the end of all the proof, after seven days of testimony, the court ruled that plaintiffs had failed to carry their burden of showing any fraudulent concealment of plaintiffs' cause of action and therefore ruled against them on that issue. Plaintiffs, however, at the close of the evidence advanced the new and different argument that defendants had failed to prove when the statute of limitations had begun to run because the acceptance by Arkoma of AER's novation offer was conditional and that there was no evidence that the condition was ever fulfilled.

I.

The court begins its consideration of this issue with the observation that the statute of limitations applicable to plaintiffs' remaining cause of action is contained in *A.C.A.* 16-56-105(1), which provides for a three-year limitations on "[a]ll actions founded on any contract . . . not in writing." In *Scroggins Farms Corp. v. Howell*, 216 Ark. 569, 226 S.W.2d 562 (1950), the Supreme Court of Arkansas noted that this statute "has regularly been applied to incidental obligations implied from written contracts." *Id.* at 572. Plaintiffs cite the court to cases from other jurisdictions to the effect that the statute of limitations for actions on covenants implied into written instruments is the same as the one applicable to actions on the instruments themselves; but the Supreme Court of Arkansas has spoken quite plainly on this very question and the conclusion seems unavoidable that the three-year statute is the relevant one.

Appendix C

Because this lawsuit was filed on February 23, 1990, it is plain that if the act complained of, namely the novation by Arkoma of the relevant gas purchase contracts, occurred prior to February 23, 1987, then this action is barred. While defendants vigorously assert that the novation was actually accomplished at the time Arkla acquired Arkoma, the court finds from the evidence that the ovation was not intended to take effect and did not take effect until AER's offer to renegotiate was formally accepted by Arkoma. The court believes that this occurred, at the earliest, on February 13, 1987, when Mr. Fred Rowe signed the letter referred to above. Plaintiffs point to language in that letter, however, that they assert vitiates the letter's effect as an acceptance. The pertinent language is that Arkoma "accepts . . . AER's . . . price renegotiation proposal *on the condition and with the understanding that AER has agreed contemporaneously herewith to amend further each contract in a form acceptable to Arkoma*." (emphasis supplied). Plaintiffs, in view of this language, invite the court to consider the common-law principle, accepted by the Arkansas courts, that a conditional acceptance of an offer amounts to a counter-offer and does not effect a contract between the parties. *See Burnett v. Holiday Inns of America*, 239 Ark. 642, 391 S.W.2d 27 (1965). Since there was no evidence adduced at trial that Arkoma's counter-offer was ever accepted, the argument runs, the relevant novation may well have occurred, if ever, after February 23, 1987, and thus plaintiffs' action was timely.

The court believes that since the statute of limitations is an affirmative defense, the defendants have the burden of proving by preponderance of the evidence that it has run. *See, e.g., Alston v. Bitely*, 252 Ark. 79, 477 S.W.2d 446 (1972). The court believes that defendants have carried that burden, though the question is a close one. The court finds that the letter of February 13, 198,

alluded to earlier, operated as an acceptance of AER's offer and effected a novation of the relevant contracts. It is apparent that the language relied on by plaintiffs does not in fact refer to new conditions that have to be agreed to by AER, but rather to agreements already made by AER and merely memorialized in a short-hand way in the letter of acceptance. That is the natural import of the language. For one thing, the "condition" is cast in the past tense, not future: It states that "AER has agreed" to certain other terms. Furthermore, since the whole point of AER's acquisition of Arkoma was to renegotiate the relevant gas purchase contracts, it is not easy to believe that the essential contours of the renegotiated contract had not been agreed to before February of 1987.

II.

After having had the advantage of a full evidentiary hearing on the merits, the court has genuine doubts that plaintiffs have proved by a preponderance of the evidence that they suffered damages as a result of defendants' alleged breach of an implied covenant to market gas. For one thing, because of the novation plaintiffs have had gas released for sale on the spot market. For another, the value of Arkoma's cause of action against AER for failure to pay past take-or-pay billings was uncertain, and the royalty owners were not entitled to receive any of that amount in any case since it would not be generated by the sale of severed gas. Finally, at the time the novation was entered into there may have been some respectable legal thought to the effect that the future take-or-pay obligations were not enforceable in any case. But since the court has concluded that the action is time-barred, it is not necessary to consider the question of damages.

Appendix C

III.

The court will enter judgment for defendants in all respects for the reasons indicated.

April 11, 1991
Date

s/ Morris S. Arnold
HON. MORRIS S. ARNOLD
UNITED STATES DISTRICT JUDGE

APPENDIX D — EXCERPTS OF ARKOMA BRIEF

* * *

pages of his Memorandum Opinion, Judge Arnold stated:

> After having had the advantage of a full evidentiary hearing on the merits, the court has genuine doubts that plaintiffs have proved by a preponderance of the evidence that they suffered damage as a result of defendants' alleged breach of an implied covenant to market gas . . . [b]ut since the court has concluded that the action is time-barred, it is not necessary to consider the question of damages.

The reversal of the limitation bar and the remand of the case for proceedings consistent with the opinion left the merits of the marketing claim to be decided by the Trial Court.[7] The Trial Court so proceeded upon remand. *See* Memorandum Opinion 1-3, Appellants' Add.

The Arkla Appellees do not disagree that a district court must obey an appellate court's mandate and that the opinion and mandate determine the issues which are open in the trial court upon remand. *Bethea v. Levi Strauss*, 916 F.2d 453, 456 (8th Cir. 1990); *Jones v. Lewis*, 957 F.2d 260, 262 (8th Cir. 1992), *cert.*

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7. The Arkla Appellees do not waive, but rather reserve, their position that the marketing claim is time barred. As argued at pages 1-12 of the Arkla Appellees Petition for Rehearing in Case 91-2239WAFS, the failure to apply Arkansas' three year limitation to the marketing claim is clearly erroneous and works a manifest injustice so that the law of the case doctrine should not be applied to the holding. *Bethea v. Levis Strauss*, 916 F.2d 453, 457 (8th Cir. 1990); *In re Progressive Farmer's Ass'n*, 829 F.2d 651, 655 (8th Cir. 1987).

denied, 113 S. Ct. 125 (1992). However, the reliance of the Plaintiff Class on the mandate in this case is misplaced. The decision and mandate reversed the Trial Court's decision that Plaintiffs' Count III action was time-barred and remanded the case to the Trial Court ' . . . for further proceedings consistent with the opinion of this . . . .

APPENDIX E — EXCERPTS OF ARKOMA PETITION FOR REHEARING

I.

ARKANSAS LAW DOE8 NOT RECOGNIZE A NOTICE OR DISCOVERY RULE REGARDING THE COMMENCEMENT OF AN APPLICABLE STATUTE OF LIMITATION; RATHER, THE APPLICABLE STATUTE OF LIMITATION BEGINS TO RUN, IN THE ABSENCE OF FRAUDULENT CONCEALMENT OF THE WRONG, FROM THE TIME OF COMMISSION OF THE ALLEGED WRONG. THE TRIAL COURT FOUND THAT THERE WAS NO FRAUDULENT CONCEALMENT.

In reversing the Trial Court's[3] decision that the marketing claim was time barred, *Klein I*, 980 F.2d at 532, notes:

> Appellants claim that it was not until March, 1987, when they received their January royalty checks, that they were put on notice of the change in their share.

Then at 980 F.2d 533, the Court concluded:

> Appellants claim the statute did not begin to run until they had or, in the exercise of due diligence, should have known, the facts that gave rise to their cause of action. We agree. The statute did not begin to run until late March, 1991 [sic], and the action is not time barred.

---

3. Honorable Morris S. Arnold.

Appendix E

These statements demonstrate the fact that the Court's opinion in *Klein I* overlooks clear, controlling Arkansas law.

A. *The law of the case doctrine does not prevent consideration.* The Arkla Appellees have preserved, not waived, their position that the marketing claim is time barred. Arkla Brief, p. 14, n.7. The failure to apply Arkansas' three year limitation to the marketing claim is clearly erroneous and works a manifest injustice so that the law of the case doctrine should not prevent consideration. *Bethea v. Levi Strauss,* 916 F.2d 453, 457 (8th Cir. 1990); *In re Progressive Farmer's Ass'n,* 829 F.2d 651, 655 (8th Cir. 1987). *See Watkins v. U.S. Army,* 875 F.2d 699, 704-05, n.8 (9th Cir. 1989), *cert. denied,* 498 U.S. 957 (the law of the case doctrine does not prevent en banc consideration of any panel decision on first or subsequent appeal).

B. *Arkansas law does not accept a "notice" or "discovery" rule regarding running of limitations. Klein I,* 980 F.2d 532, deals with the time limitation issue by referring to the February 13, 1987, date on which a formal amending document, executed on February 10, 1987, was forwarded by Arkoma to AER. Plaintiffs/Appellants' action was not filed until more than three years subsequent to February 13, 1987, so the Trial Court held the implied covenant cause of action to be time barred. Arkansas law is clear that a cause of action accrues, if at all, "the moment the right to commence an action comes into existence." *See, e.g., Dupree v. Twin City Bank,* 300 Ark. 188, 191, 777 S.W.2d 856 (1989). Under Arkansas law, neither ignorance of the existence of a cause of action nor lack of notice of the cause of action prevents the limitation from running from the time the cause of action accrues. *Chapman v. Alexander,* 307 Ark. 87, 88, 817 S.W.2d 425 (1991); *Ford's Inc. v. Russell Brown & Co.,* 299 Ark. 426, 429, 773 S.W.2d 90, 92 (1989); *Riggs v. Thomas,* 283 Ark.

148, 149, 671 S.W.2d 756, 757 (1984). In both *Ford's Inc.* and *Riggs,* the Arkansas Supreme Court expressly declined to overturn this principle of Arkansas law in favor of a "notice" rule regarding the commencement of a limitation period. In *Chapman*, the Arkansas Supreme Court expressly rejected three alternative "notice" approaches and declared that any change in the Arkansas rule would have to come from the Arkansas General Assembly;. . . .

APPENDIX F — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Commencing at page 315]

Alan Warren

gas purchase contracts.

A Yes.

Q And inquired as to your knowledge as to the extent to hich those had been litigated to fruition.

A Yes.

Q Are you with me on that?

A I'm with you still. Okay. Whether those issues have been litigated or not, r. Warren, is it not true that those issues were in the minds of both producers and pipelines December 31, 1986, January 1, 1987.

A They certainly were.

Q And they were factors that any producer would have to onsider?

A Yes.

Q Did AEC or Arkoma do anything to keep its royalty owners rom discovering the price change that was effective with production January 1, 1987?

A No, we did not.

Q In fact, as soon as they got their checks on it they would be aware of it; isn't that correct?

A That's correct.

Q That decision was made effective production January 1, 1987; isn't that correct?

A That's correct.

[319] And he's saying here that the marketing contract is confidential, because if we reveal the end user or the price that we're receiving from the end user, then obviously Brock Oil and Gas, if they have released gas, can then go out and compete, you know, with that market.

Secondarily, of course, over the course of my thirty-odd years in the business, it's been drummed into my head many, many times that we have antitrust reasons not to discuss prices with other competitors, and at this point Brock is obviously a competitor.

Q One last question, Mr. Warren. Since the royalty checks for January '87 production would be going out in March or April of 1987, are you aware of any conscious or unconscious action or decision among the Arkoma employees to secrete or hide the fact that the February 10 and February 16 amendments to Contract 5239 had been entered into?

A No, there were no acts of that type. I mean, all we were doing was business as usual. When we entered into those contracts, it was just normal business.

Appendix F

MR. CANFIELD: Pass the witness, Your Honor.

THE COURT: Mr. Jesson, your witness, sir.

MR. JESSON: Thank you, Your Honor.

CROSS EXAMINATION

BY MR. JESSON:

Q Mr. Warren, I believe you said that you've looked through. . . .